Leiden Journal of International Law (2018), 31, pp. 383–401
© Foundation of the Leiden Journal of International Law 2018 doi:10.1017/S092215651800002X

HAGUE INTERNATIONAL TRIBUNALS
INTERNATIONAL COURT OF JUSTICE

Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case

NICCOLÒ RIDI*

Abstract
This article considers the approach to the *res judicata* principle taken by the International Court of Justice (ICJ or the Court) and, specifically, its application in its 2016 judgment on preliminary objections in the latest dispute between Nicaragua and Colombia. The judgment joins the small number of ICJ decisions in which the Court was evenly split, an altogether rare situation, which, at the time of the decision, had not occurred since the *Nuclear Weapons* Advisory Opinion. Intriguingly, such a fracture seems to have been prompted by differences over the operation of a procedural principle the understanding of which is comparatively uncontroversial. Upon closer analysis, however, the disagreement reveals that more significant questions were at stake, with members of the minority issuing a vocal joint dissent and several individual declarations. This study will move in three parts: first, it will provide an overview of the nature and purpose of the principle of *res judicata*, its application in international adjudication, and its use by the ICJ; second, it will analyze the Court's reading of the principle in the case at issue; third, it will expose the broader implications of one such approach for the role and authority of the World Court and the international judiciary.

Keywords
International Court of Justice; issue estoppel; judicial function; *res judicata*; scope of judgments

1. Introduction

On 17 March 2016 the ICJ delivered its judgment on the preliminary objections raised by Colombia in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.[1] The rejection of the respondent's third preliminary objection, contending

* LLB/MA (University of Florence); LLM (Cantab); PhD Candidate (Modern Law Review Scholar), The Dickson Poon School of Law, King's College London; collaborateur de recherche, Graduate Institute of International and Development Studies, Geneva [niccolo.ridi@kcl.ac.uk]. I am grateful to Philippa Webb, John Tasioulas, Peer Zumbansen, Esmé Shirlow, Luíza Leão Soares Pereira, and Napoleon Xanthoulis for their invaluable comments. All errors remain my own.

1 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2017 (not yet published) (hereinafter *Delimitation of the Continental Shelf*). On the same day, the Court also delivered

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

that the principle of *res judicata* barred a re-examination of Nicaragua's application, was only reached through the casting vote of the President, as the Court found itself evenly split on the matter. Specifically, the question was whether the application should have been declared inadmissible on the grounds that the issues raised had already been decided on in the 2012 judgment in the case of *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* between the same parties.[2]

The 2016 judgment in the *Delamination of the Continental Shelf* case is one of the rare instances in the history of the ICJ where the Court was evenly split, the last occurrence being in 1996.[3] Intriguingly, this divide was prompted by the operation of a procedural principle, the understanding of which is relatively uncontroversial. Upon closer analysis, however, the contrast between the majority and the minority, with several members issuing a vocal joint dissent and individual declarations, reveals that more divisive questions relating to the value of finality and the judicial function were at stake.

The significance of these issues and the broader implications of the approach taken by the Court in its decision warrant further analysis. This article will proceed in three parts: first, it will provide an overview of the nature and purpose of the principle of *res judicata*, its application in international adjudication, and its use by the ICJ; second, it will analyze the Court's reading of the principle in the case at issue; third, it will assess the broader implications of one such approach for the role and authority of the ICJ and the international judiciary more broadly.

2. THE PRINCIPLE OF *RES JUDICATA* AND INTERNATIONAL ADJUDICATION

2.1. Overview of *res judicata* and its rationales

Res judicata, literally 'a matter that has already been judged', is a principle that protects the finality of judgments.[4] A shared feature of both civil and common law systems, it serves multiple purposes: as a matter of private justice, it protects defendants from having to answer proceedings multiple times concerning the same matter (*nemo debet bis vexari pro una et eadem causa*) and can thus be analogized with the cognate principle of *ne bis in idem*.[5] As a matter of public policy, it ensures that

its judgment in another case brought by the same applicant against the same respondent, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2017 (not yet published).

[2] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep. 624 (hereinafter *Territorial and Maritime Dispute*).

[3] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226. The Court was also evenly split in the controversial *South West Africa (Ethiopia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, and so was the Permanent Court of International Justice (PCIJ) in the *SS Lotus case (France v. Turkey)*, PCIJ Rep Series A No. 10. More recently, the Court found itself evenly split in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016 (not yet published).

[4] The use of the Latin expression is widespread in English and German speaking countries, but literal translations are more commonly used elsewhere: for example, *cosa juzgada*, *chose jugée*, or *cosa giudicata* in Spanish, French, and Italian respectively.

[5] Y. Sinai, 'Reconsidering Res Judicata: A Comparative Perspective', (2011) 21 *Duke Journal of Comparative & International Law* 353.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

there is an end to litigation (*expedit rei publicae ut sit finis litium*), furthers legal security considerations by preventing divergent decisions being taken on the same matter, and encourages the economic efficiency of the courts in both the second proceedings (by allowing the dismissal of the suit) and in the first (by charging the claimant with the burden of presenting a complete claim, rather than fragmenting it).[6]

Conceptually, *res judicata* is a relatively broad notion, covering a number of different effects of a final judgment, which may be classified as conclusive (meaning that the judgment is final and binding upon the parties) and preclusive (meaning that the matter cannot be subject to further litigation). The first element depends on the formal finality of the judgment, which is subject to its own rules. The second element, in turn, derives from the first and makes it impossible to re-open a matter that has been decided with a final judgment that is binding upon the parties. In this context, the effects of *res judicata* can be classified as procedural and substantive, the former serving as a procedural bar against a re-hearing of the dispute by the same court, the latter being broader in scope and designed to make the judgment govern the relationship between its parties with respect to the question it decided.[7]

Preclusive effects can be further categorized as causing either claim preclusion (or claim estoppel, by reference to the corresponding plea) or issue preclusion (issue or 'collateral' estoppel).[8] Claim preclusion concerns the cause of action, whereas issue preclusion relates to issues of fact or law determined in the previous proceedings. Beyond terminological divergences in the literature, in most civil law systems and in international law issue preclusion questions are understood to lie beyond the theoretical boundaries of *res judicata* proper, with the consequence that the expression is usually given – and is given here – a narrower meaning.[9] In this understanding, with some approximation, *res judicata* proper requires the satisfaction of a strict 'triple identity test', meaning that the parties, cause of action, and object of the claim must be the same.

2.2. ***Res judicata* in international adjudication: Status, problems, and significance**

The applicability of *res judicata* in public international law litigation is today relatively uncontroversial, albeit the same cannot always be said of its application.[10] For over a century it has been employed and referred to as an established rule of law.[11]

---

6 R.A. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration', (1973) *The Journal of Legal Studies* 399, at 444.

7 The two concepts may be more or less neatly distinguished in domestic law: by way of example, Art. 324 of the Italian Code of Civil Procedure describes the essential elements of a final judgment (*formal res judicata*), whereas Art. 2909 of the Civil Code illustrates the effects of the former (*substantive res judicata*). On the matter see, *inter alia*, M. Cappelletti, *Civil Procedure in Italy* (2013), 251.

8 The first distinction is more common in the United States, whereas the second is typical of England and Canada. See Sinai, *supra* note 5, at 357.

9 See also the interim report of the International Law Association Committee on International Commercial Arbitration, '"Res judicata" and Arbitration' (Berlin, 2004), 14.

10 On *res judicata* in public international law in general see E. Grisel, 'Res judicata: l'autorité de la chose jugée en droit international', in B. Dutoit and E. Grisel (eds.) *Mélanges Georges Perrin* (1984), 139; L.N.C. Brant, *L'autorité de la chose jugée en droit international public* (2003).

11 *The Pious Fund Case (United States of America v. Mexico)* Vol IX UNRIAA 1, at 12 (1902); *In the Matter of the SS Newchwang (Great Britain v. United States)*, Vol VI UNRIAA 64, at 65 (1921); *Trail Smelter case (United States,*

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

Following the well-known dissenting opinion of Judge Anzilotti in the *Chorzów Factory* case, *res judicata* has usually been qualified as a general principle of law in the sense of Article 38(1)(c) of the Court's Statute.[12] As to the requirements of *res judicata*, the principle has been generally understood not to operate across legal orders, with the implication that only decisions by international tribunals (including mixed arbitration tribunals) may bar a subsequent claim.[13] In practice, tribunals have set more exacting conditions, and have been reluctant to make a finding of *res judicata* in relation to a decision that they have not themselves issued, or which (at least) did not originate within the same system.

Continuing with the oft-cited exposition by Anzilotti, a strict test must be carried out to ensure the cumulative identity of parties, object, and cause of action (*persona*, *petitum*, and *causa petendi*).[14] Procedurally, *res judicata* fits squarely – though not entirely without controversy – in the category of admissibility, rather than jurisdiction.[15] While these categories are derived from municipal law and are well-understood,[16] the distinction between the two is worth restating: an objection to the jurisdiction of the tribunal strikes at the very existence of adjudicative power; an objection to admissibility is a plea that the tribunal itself is incompetent to give any ruling at all, whether as to the merits or the admissibility of the claim.[17] This qualification has decisive implications in certain contexts. In investment arbitration, for example, it is possible to seek review of the tribunal's decision on jurisdiction in municipal courts at the seat of the arbitration or before an *ad hoc* committee, whereas a decision on admissibility remains final.[18] The distinction is less relevant

Canada) Vol III UNRIAA 1905, at 1950 (1941): 'That the sanctity of res judicata attaches to a final decision of an international tribunal is an essential and settled rule of international law.'

12 *Interpretation of Judgments Nos 7 & 8 Concerning the Case of the Factory at Chorzów (Germany v. Poland)*, PCIJ (Series A) No. 11, at 27 (Judge Anzilotti, Dissenting Opinion). One such qualification was, however, not entirely novel; in fact, it was cited to elucidate the meaning of Art. 38(1)(c) during the works of the Advisory Committee of Jurists: see *PCIJ Procès-Verbaux of the Proceedings of the Committee of Jurists, June 16th-July 24th 1920* (1920), at 335 (statement of Lord Phillimore). There has been consistent agreement among scholars as to the qualification of *res judicata* as a general principle of law in the sense of Art. 38(1)(c) of the Court's Statute: see H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927), 206; B Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (1953), 337. For more recent assessments see I. Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch', (1999) 20 *Australian Year Book of International Law* 299, at 299; C. Brown, *A Common Law of International Adjudication* (2007), 155–6; A. Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004), 3 *The Law & Practice of International Courts and Tribunals* 37, at 44.

13 Other principles, such as comity, have sometimes been invoked for these purposes: see *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Decision on Jurisdiction, 27 November 1985, ICSID Case No. ARB/84/3. On comity, see T. Schultz and N. Ridi, 'Comity and International Courts and Tribunals' (2017) 50(3) *Cornell International Law Journal* (not yet published).

14 Ibid., at 23.

15 G.L. Walters, 'Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?', (2012) 29 *Journal of International Arbitration* 651; M. Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', University of Cambridge Faculty of Law Research Paper No. 9/2014.

16 J.C. Wittenberg, 'La recevabilité des réclamations devant les juridictions internationales', (1932/III) 41 RCADI 5, at 8.

17 G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), 438–9; Z. Douglas, *The International Law of Investment Claims* (2005), 146.

18 See J. Paulsson, 'Jurisdiction and Admissibility', in G. Aksen et al. (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in honour of Robert Briner* (2005), 601.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

for courts of 'first and last resort' such as the ICJ, where it may, at most, affect the Court's ordering of its own procedure.[19]

The principle of *res judicata* has been accepted by several international courts and tribunals, either because of its express inclusion in their constitutive instruments,[20] or by subsequent development through their judicial pronouncements. In spite of its widespread and early recognition, however, to date *res judicata* has not been applied extensively.[21] Investment tribunals have been no exception, not unlike the cognate – but less widely accepted – principle of *lis alibi pendens*, which concerns parallel proceedings rather than successive claims.[22] It is true though that investment disputes present additional complications, ranging from the question of which law should govern the operation of *res judicata* to the many doubts that can arise with regards to the identity of the parties, matter, and cause of action.[23] It is difficult to establish, for example, whether and to what extent claims brought by different shareholders, under different bilateral investment treaties (BITs), and claiming either the same or different remedies, should be considered identical.[24]

More recently, the principle of *res judicata* has been invoked as a possible remedy to the ill-effects of the proliferation of international courts and tribunals, which, coupled with the relative rigidity of their jurisdictional provisions, results in the possibility of parallel litigation, forum shopping, and divergent decisions on similar cases, issues and rules, prompting 'fragmentation concerns'.[25] Since the international legal system does not possess built-in jurisdiction-regulating rules, it has often been submitted that the answer may lie in general principles, of which *res judicata* is one.[26] In this context, too, the strictness of the 'triple identity test' may produce undesirable consequences.[27] Accordingly, attention has more recently been

[19] Ibid., at 603.

[20] Such provisions are, however, often broader in scope. For a detailed overview see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), Ch. 5.

[21] L.B. de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', (2017) 28 EJIL 13, at 64.

[22] M. Waibel, 'Coordinating Adjudication Processes', in Z. Douglas, J. Pauwelyn and J.E Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (2014), 499 at 522; On *lis pendens* in general see C. McLachlan, *Lis Pendens in International Litigation* (2009).

[23] H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013), 176–7. On *res judicata* in international commercial arbitration see S. Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (2016). A further significant problem is that of the pendency of annulment proceedings in relation to a previous decision: see *Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Perenco's Application for Dismissal of Ecuador's Counterclaims, 18 August 2017, para. 49.

[24] J. Magnaye and A. Reinisch, 'Revisiting *Res Judicata* and *Lis Pendens* in Investor-State Arbitration', (2016) 15 *The Law & Practice of International Courts and Tribunals* 264, at 276.

[25] On the concept of 'fragmentation' see M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission', UN Doc. A/CN.4/L.682 (13 April 2006), para. 8. See also G. Guillaume, 'Advantages and Risks of Proliferation: A Blueprint for Action', (2004) 2 *Journal of International Criminal Justice* 300, at 303; J. Crawford and P. Nevill, 'Relations between International Courts and Tribunals: The "Regime Problem"', in M.A. Young (ed.), *Regime Interaction in International law: Facing Fragmentation* (2012), 211; J. Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (2014), 212; P. Webb, *International Judicial Integration and Fragmentation* (2013).

[26] Shany, *supra* note 20, Ch. 5; Brown *supra* note 12, at 29; Crawford and Nevill, *supra* note 25, at 239; Wehland, *supra* note 23, at 125–6; C. Giorgetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?', (2015) 30 *ICSID Review* 98.

[27] The *CME / Lauder* saga is a paradigmatic example: see *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

devoted to the rediscovery of the broader construct of issue estoppel,[28] which may be said to have been sometimes employed by international tribunals,[29] and the concept of 'judicial comity', which are not subject to the same constraints.[30]

3. The ICJ and *res judicata*

3.1. The ICJ and the basis of *res judicata*

At the ICJ, the parties are usually in agreement about the existence of *res judicata* and the Court rarely discusses the basis of the principle. However, a distinction must be made between the *res judicata* effect of the decisions of other international tribunals and that of the Court's own.

3.1.1. Decisions of other international courts and tribunals

Decisions of other international courts and tribunals have been found by the PCIJ and, later, the ICJ to be capable of preclusive effect.[31] The Court has normally relied on the status of *res judicata* as a general principle of law to justify its application, though without necessarily offering explanations to that effect. These matters were mostly considered in the exercise of the Court's supervisory functions, though a shift in its approach has ostensibly occurred. For example, in *Socobelge*, the PCIJ strongly relied on the principle, holding that it meant 'nothing else than recognition of the fact that the terms of that award are definitive and obligatory' and refusing to allow a re-litigation of the case. Yet, in *Arbitral Award of the King of Spain* and *Arbitral Award of 31 July 1989*,[32] the Court did not refer to the concept, perhaps signalling a drift 'toward something between review and an appeal of the merits'.[33]

3.1.2. Decisions of the ICJ

The Court's approach to its own decisions has some important differences. First, the principle is understood to have its basis in the Statute, in Articles 59 and 60,

---

September 2001; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003. See also Magnaye and Reinisch, *supra* note 24, at 278.

[28] One example is *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/ 12/1, Award, 25 August 2014, paras. 7.17 ff. See also Magnaye and Reinisch, *supra* note 24, at 285.

[29] Precedents may be found, for example, in the *Orinoco* case, where Umpire Plumley said that '[e]very matter and point distinctly in issue in said cause and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree ... The general principle, announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined, by a court of competent jurisdiction as a ground of recovery, cannot be disputed': Claim of Company General of the Orinoco, Report of French-Venezuelan Mixed Claims Commission of 1902, at 355.

[30] Waibel, *supra* note 22, at 523.

[31] *Société commerciale de Belgique (Socobelge) (Belgium v. Greece)*, PCIJ Series A/B No. 78, at 178.

[32] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53; *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment of 18 November 1960, [1960] ICJ Rep. 192.

[33] W.M. Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', (1996) 258 RCADI 9, at 34. See also, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, at 76, para. 111.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

which may be understood to govern the formal value of *res judicata* and its limits.[34] Article 60 restricts itself to affirming that the decisions of the Court are 'final and without appeal'.[35] It has, however, been read by the Court as 'reflect[ing] the primacy of the principle of *res judicata*'.[36] This approach has been particularly evident in cases concerning requests for interpretation of judgments of the Court, which are covered by the second sentence of Article 60: as the Court put it in Request for Interpretation of the Judgment of 20 November 1950 in the *Asylum* Case, the object of any such request:

> must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.[37]

Article 59, clarifying that such decisions have 'no binding force except between the parties and in respect of that particular case', is actually intended to rule out a doctrine of binding precedent, or at least to exclude the possibility that no states other than those party to the disputes may be bound by the judgment.[38] The binding nature of the decision on the parties is, however, logically anterior to either conclusion. Further, the term 'decision' is to be interpreted broadly, covering decisions on the merits and preliminary objections alike,[39] though there are some additional difficulties, mostly relating to the scope, if any, of the preclusive effect of judgments of the latter type.[40] The formal qualification of the decision does not matter but compelling reasons suggest that orders on provisional measures should not be given *res judicata* effect.[41] It is, however, clear that advisory opinions are not covered by the provision.[42] Article 61, too, has bearing on the matter, as it constrains the ability of the parties to seek the revision of a judgment in quite a strict fashion.[43]

---

34 S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (2005), 1599.

35 The judgment becomes final and binding upon the parties on the day of its reading: see Art. 94 of the Rules of Court.

36 *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Nigeria v. Cameroon)*, Preliminary Objections, Judgment of 25 March 1999, [1999] ICJ Rep. 31, at 36, para. 12.

37 *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment of 27 November 1950, [1950] ICJ Rep. 395, at 402; *Request for Interpretation - Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 36, at 36–7, para. 12. See also *Interpretations of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment no. 11 1927, PCIJ, Series A No. 13, at 11.

38 M. Shahabuddeen, *Precedent in the World Court* (2007), 99–100; Rosenne, *supra* note 34, at 1585.

39 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 91, para. 117 (hereinafter *Bosnian Genocide-Merits*). It must be observed that the Court accepted that a finding that it had jurisdiction did not prevent the subsequent examination of 'any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment', but only insofar as a decision on them would not contradict the findings made in the earlier judgment (paras. 127–8).

40 The question of whether 'they attract the obligation of compliance', which must be answered in the affirmative, is conceptually distinct: see Rosenne, *supra* note 34, at 804.

41 C. Brown, 'Article 59', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 1416.

42 Rosenne, *supra* note 34, at 28–9.

43 Brown, *supra* note 41.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

3.2. Effect and scope of *res judicata*

The effect of *res judicata* is hardly controversial: by its operation, 'the matter is finally disposed for good' and further claims are precluded.[44] However, determining what has been decided with binding force raises more complex questions. On the one hand, the problem is evident in interpretation and revision judgments, which *res judicata* bars from going beyond the limits of the original decision.[45] On the other hand, and more significantly, the problem must be considered when matters that have already been decided with binding force are brought again under the cloak of an entirely new claim.

As a matter of principle, *res judicata* only attaches to one portion of the judgment – the *dispositif* or operative part.[46] The Court has, on occasion, included in the *dispositif* of the decision matters that it was not asked to adjudge and were not decisive for the solution given.[47] The approach has been criticized on the grounds that, by so doing, the Court would exceed its jurisdiction.[48] The Court's reasoning, which is not included in the *dispositif*, does nevertheless have relevance. As the PCIJ put it in *Polish Postal Service in Danzig*, 'all the parts of a judgment concerning the points in dispute ... are to be taken into account in order to determine the precise meaning and scope of the operative portion'.[49] Any preclusive effects of the *dispositif* are thus to be assessed in light of the *motifs*.[50] In the *Bosnian Genocide* case, the Court introduced a further distinction, between:

> first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all.[51]

This last case is the most interesting – if problematic – comparator for the question of *res judicata*. As is well known, the *Bosnian Genocide* decision arose from the procedural odyssey connected to the events of the Balkans conflict, together with the issue of the membership of the Federal Republic of Yugoslavia (FRY) in the United Nations (UN) and the resulting question concerning its access to the Court.[52] In this case, too, the parties were in agreement as to the existence of *res judicata* as a principle but disagreed over its scope. The central question was that one party maintained that the issue of party status had not been conclusively ruled upon in the 1996 judgment, which had affirmed the Court's jurisdiction. This conclusion appeared to

---

44 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Preliminary Objections, Judgment of 24 July 1964, [1964] ICJ Rep. 6, at 20.

45 Rosenne, *supra* note 34, at 1612.

46 *Bosnian Genocide-Merits*, *supra* note 39, at 94, para. 123.

47 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-claims, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 218, para. 125.

48 Ibid., at 274, para. 10 (Judge Buergenthal, Separate Opinion).

49 *Polish Postal Service in Danzig, Poland v. High Commissioner of the League of Nations and Free City of Danzig, Advisory Opinion*, PCIJ Series B, No. 11, at 29–30.

50 Brown, *supra* note 41. It bears noting that the distinction between *dispositif* and *motifs* receives implicit endorsement in the wording of Art. 95 of the Rules of Court, according to which '[t]he judgment ... shall contain ... the reasons in point of law; the operative provisions of the judgment'. On the lack of relevance of this provision for the distinction between *ratio* and *obiter* see Rosenne, *supra* note 34, at 1556.

51 *Bosnian Genocide-Merits*, *supra* note 39, at 95, para. 126.

52 Ibid., at 76, paras. 80–7.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

be supported by the wording of the judgment, as well as by the subsequent *Legality of Use of Force* cases, which had declined jurisdiction on the basis that the FRY was not a UN member state and had no access to the Court at the time of its application.[53] In view of that, Serbia and Montenegro raised again, at the merits phase, the issue of the UN membership of the FRY and the resulting question of its access to the Court.[54]

The Court rejected the contention that *res judicata* attaches to decisions on preliminary objections and on the merits in different ways.[55] It accepted that '[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it'.[56] It went on to examine the question, distinguishing the issues decided with the force of *res judicata* from either *obiter dicta* and 'matters that have not been ruled upon at all',[57] before finally concluding that 'a determination that all the conditions relating to the capacity of the Parties to appear before it had been met', that is to say, a decision on whether the FRY was a party to the Statute had been taken, and had been included in its previous judgment.[58] Accordingly, it applied the principle of *res judicata*, avoiding a re-opening of the matter.[59]

That a decision on the issue had been taken did not appear, for lack of a more generous word, obvious – indeed, Judges Shi, Ranjeva, and Koroma, the only ones on the bench to have taken part in the 1996 judgment, denied that the Court had definitely ruled on the matter with *res judicata* effect.[60] As Wittich notes, reliance on *res judicata* prevented the Court from having to choose between the equally inconvenient solutions of failing to end the dispute, disrupting the consistency of the case law, and ultimately undermining its own authority.[61] One could argue that the fact that such new objections, if successful, would have necessarily reversed the 1996 judgment may suffice as a justification.

4. *Res judicata* in *Delimitation of the Continental Shelf*

The above approach was apparently modified in the 2016 judgment on preliminary objections in *Delimitation of the Continental Shelf*. While the decision raises several interesting problems, for reasons of space and scope this article will restrict itself to the question of *res judicata*.

---

53 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 316–17, paras. 96–7.
54 *Bosnian Genocide-Merits*, *supra* note 39, at 76, para. 80 et seq.
55 Ibid., at 95, para. 125.
56 Ibid., at 96, para. 126.
57 Ibid.
58 Ibid., at 99, para. 133.
59 Ibid., at 101, para. 140.
60 Ibid., at 267, para. 3 (Judges Shi, Ranjeva, and Koroma Dissenting Opinion). S. Wittich, 'Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case', (2007) 18 EJIL 591, at 606; See also, generally, C.F. Amerasinghe, 'The *Bosnia Genocide* Case', (2008) 21 LJIL 411; M. Ottolenghi and P. Prows, 'Res Judicata in the ICJ's *Genocide* Case: Implications for Other Courts and Tribunals', (2009) 21 *Pace International Law Review* 37.
61 Wittich, *supra* note 60, at 618.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

4.1. Overview

The proceedings under consideration were instituted by Nicaragua in September 2013. The application was thus filed shortly after the Court's 2012 decision concerning the same parties, which concluded the lengthy case on the *Territorial and Maritime Dispute*. It will be recalled that in 2001 Nicaragua had instituted proceedings against Colombia on the basis of Article XXXI of the Pact of Bogotà. The dispute concerned territorial sovereignty on certain features and a maritime boundary in the Western Caribbean Sea. After a decision on preliminary objections rendered in 2007, the Court issued a judgment on the merits on 19 November 2012. It found Nicaragua's request to adjudge and declare that '[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties' admissible. However, it also found that it could not 'uphold the Republic of Nicaragua's claim contained in its final submission I(3)'.[62] Shortly thereafter, relying on the same jurisdictional basis, Nicaragua filed a new application, requesting the Court to adjudge and declare '[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012' and '[t]he principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast'.

4.2. Colombia's third preliminary objection

In its third preliminary objection, Colombia sought to contest the jurisdiction of the Court on the grounds that Nicaragua's requests had been already adjudicated in the 2012 judgment and were thus precluded by the operation of *res judicata*.[63] Colombia found Nicaragua's first request in the present case to be 'no more than a reincarnation' of the one adjudged in 2012, which, it maintained, the Court admitted but did not uphold on the merits. It similarly found the second request, concerning the identification of the principles and rules of international law determining their rights and obligations in relation to the overlapping continental shelf pending the delimitation of their maritime boundary, was dependent on the first.

The parties agreed as to the basis and constitutive elements of *res judicata*. They disagreed 'on the meaning of the decision adopted by the Court in subparagraph 3 of the operative clause of its 2012 Judgment, and hence on what falls within [its] scope'.[64]

Indeed, Colombia contended that the Court, after 'having found in the operative clause of the 2012 Judgment ... that it "cannot uphold" Nicaragua's claim for lack

[62] *Territorial and Maritime Dispute*, *supra* note 2, at 719, para. 251.
[63] *Delimitation of the Continental Shelf*, *supra* note 1, para. 47.
[64] Ibid., para. 54.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

of evidence', was precluded from upholding an identical claim in a later judgment.[65] Nicaragua, however, relied on *Bosnian Genocide* to argue that for *res judicata* to apply 'the matter should have been disposed of by the Court finally and definitively': accordingly, it claimed that the core question was whether the Court had in fact decided the matter of the delimitation of the overlapping continental shelf.[66]

For Colombia, the phrase 'cannot uphold' was to be read in light of paragraphs 126 and 129 of the 2012 judgment, where the Court set out the law applicable to the issue and determined, after observing that 'Nicaragua, in the present proceedings, ha[d] not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast', and that it was 'not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it'.[67] Nicaragua, instead, maintained that the 2012 decision had not ruled on the claim on the merits. On the contrary, reading the (admittedly ambiguous) phrase 'cannot uphold' in context revealed that the Court had refused, in light of the fact that Nicaragua had not completed its submission to the Commission on the Limits of the Continental Shelf (CLCS), to rule on the issue and restricted itself to observing that it was not in a position to effect a delimitation. Having, in 2013, submitted the necessary information to the CLCS, the Court now possessed the necessary information to effect the delimitation and was not precluded from doing so by the 2012 judgment.

4.3. The majority

The Court chose, in line with its jurisprudence, to qualify the objection as one of admissibility, rather than jurisdiction.[68] Further, it elected to address the question of the dependence of the second request in its examination of Colombia's fifth objection.[69] As to *res judicata*, it accepted the need for the matter to '[have] been determined, expressly or by necessary implication'. Such determination, it continued with its reference to *Bosnian Genocide*, must be contained in the operative part of the judgment, to be interpreted in context.[70]

Interestingly, the Court noted that 'although in its 2012 Judgment it declared Nicaragua's submission to be admissible, it did so only in response to the objection to admissibility raised by Colombia that this submission was new and changed the subject-matter of the dispute'.[71] Further, the Court did not accept Nicaragua's claim that the phrase 'cannot uphold' amounted to a rejection of the claim, but neither did it accede to Colombia's view that it necessarily did. Instead, it proceeded to examine the phrase in context to understand whether it amounted to a dismissal for lack of

[65] Ibid., para. 56.
[66] Ibid., para. 57.
[67] Ibid., paras. 66–7; *Territorial and Maritime Dispute*, *supra* note 2, at 668–9, paras. 126–9.
[68] *Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgment of 21 March 1959, [1959] ICJ Rep. 6, at 26.
[69] *Delimitation of the Continental Shelf*, *supra* note 1, paras. 52–3.
[70] Ibid., paras. 60–1; *Bosnian Genocide-Merits*, *supra* note 39, at 96, para. 126.
[71] *Delimitation of the Continental Shelf*, *supra* note 1, para. 72.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

evidence or a refusal to rule on the request because of the failure to fulfil a procedural requirement.[72] It found that the judgment contained no analysis of the submissions of the parties concerning the evidence provided by Nicaragua. Additionally, the task at hand in the previous case was limited: consequently, the identification of the applicable law did not entail a determination on the substantive legal standards that Nicaragua had to meet to prove its claim. Rather, the Court emphasized Nicaragua's obligation to submit information to the CLCS, which it had failed to do at the time. It also relied on the reference contained in the 2012 judgment to 'present proceedings', which seemed 'to contemplate the possibility of future proceedings' and the fact that the decision is silent as to the maritime areas east of the line lying 200 nautical miles from the islands fringing the Nicaraguan coast.[73] The Court found that its decision not to uphold the claim was only due to Nicaragua's failure to discharge its procedural obligations under UNCLOS. The procedural requirement having been discharged in 2013, the claim was now ripe.

4.4. The minority

Eight judges did not find this interpretation tenable and appended dissenting opinions. In their joint dissent, Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower (*ad hoc*) examined four points. First, after reiterating that *res judicata* attaches to the *dispositif*, they stressed the need to examine the meaning of the phrase 'cannot uphold', citing ample case law to the effect that the phrase had been consistently used by the Court to reject claims, rather than refraining or abstaining from making a decision pending the fulfilment of a procedural requirement or the submission of sufficient evidence.[74] As to the Court's examination of the reasoning underlying the 2012 judgment, they maintained that the absence of a mention of a requirement to submit information to the CLCS demonstrated that the Court had indeed rejected Nicaragua's request for failure to prove the existence of an overlapping extended continental shelf. Further, they contended that the 2012 judgment included no suggestion that the Court had intended to admit the possibility of future proceedings, as such indications, in the Court's jurisprudence, had always been explicit.[75] What is more, the Court did not say in paragraph 129 of the 2012 judgment that it was unable to effect a delimitation for lack of a procedural requirement, but rather said that Nicaragua had not established (in French: '*n'ayant pas… apporté la preuve*') that it had any continental margin extending far enough to overlap with Colombia's own.[76] Had that indeed been the case, it would have been redundant for the Court to address the (separate and separately rejected) request of

---

72 Ibid., para. 74.

73 Ibid., paras. 82–4

74 Ibid., paras. 9–18 (Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower Joint Dissenting Opinion), citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 172–3, para. 20; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44, at 66, para. 35; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 10 December 1985, [1985] ICJ Rep. 192.

75 Ibid., para. 20.

76 Ibid., para. 26.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

adjudication over Nicaragua's proposed 'general formulation' regarding the outer limits of the extended continental shelf.[77]

The joint dissent also makes clear that the fact that no analysis of the geological and geomorphological evidence presented by Nicaragua is discussed in the 2012 judgment did not mean that the Court had failed to take it into account. Indeed, the Court 'is not required to, and frequently does not, mention every piece of evidence it considered in reaching a particular conclusion'.[78] That it *did* consider it was demonstrated by its finding that Nicaragua's information was insufficient.[79] On the contrary, the majority created a procedural requirement (the submission of information to the CLCS) reading it as a condition of admissibility, but incoherently.[80] In fact, the Court had not, *proprio motu*, raised an issue of admissibility, allowing Nicaragua's request instead.[81] It was thus not clear how the Court could not pronounce on the merits of the claim, after declaring it admissible, and how it could later entertain the illogical proposition that a submission of the CLCS had been a procedural requirement all along.[82]

The dissenting judges also observed that, even accepting the majority's interpretation, Nicaragua should not have been allowed an opportunity to remedy the procedural flaw that thwarted its claim. This followed from the principle of *ne bis in idem*, which, like *res judicata*, is meant to prevent the ill-effects of repeat litigation.[83] Further, given that Nicaragua brought an identical claim, under the same basis of jurisdiction, the issue of 'exhaustion of treaty processes' could also have precluded the Court entertaining the request once the case had been 'prosecuted to judgment'.[84]

Finally, they concluded by affirming the paramount importance of the objectives pursued by *res judicata* – finality of litigation and protection from repeat litigation – for the operation of the international legal system and its subjects. Not respecting the principle would have been tantamount to undermining the judicial function and the authority of the Court as the principal judicial organ of the United Nations, especially in the context of a protracted dispute like the case at issue.

Judge Donoghue, too, appended a separate opinion, disagreeing with the majority to a more limited extent. In her view, there could be no doubt that the Court had decided on the merits of Nicaragua's first request, by determining that the evidence submitted was no proof that Nicaragua's continental shelf entitlement overlapped with Colombia's mainland entitlement.[85] However, no determination had been made regarding the question of whether one such overlap existed between Nicaragua's entitlement and that of Colombia's, generated by its islands, lying

77 Ibid., para. 27.
78 Ibid., para. 30.
79 Ibid., para. 31.
80 Ibid., para. 42.
81 Ibid., para. 46.
82 Ibid., para. 48. Judge Robinson observed in his separate dissent that the 'invention' of this requirement by the majority resulted in the application of treaty obligations between a state party and a non-state party of the UNCLOS (paras. 15–18). See, however, Separate Opinion of Judge Owada, paras. 33–9.
83 *Delimitation of the Continental Shelf*, *supra* note 1, para. 59 (Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower Joint Dissenting Opinion).
84 Ibid., paras. 61–2.
85 *Delimitation of the Continental Shelf*, *supra* note 1, paras. 20 ff. (Judge Donoghue Dissenting Opinion).

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

beyond 200 miles from its coasts. Accordingly, no preclusive effect could be said to follow on the matter.[86]

5. Appraisal and implications

5.1. The principle of *res judicata* and what it covers

If there is a lesson to be learned from the *Delimitation* saga, it is that agreement on the law is in itself a modest accomplishment: the same rules, though properly understood, can generate paradoxically divergent solutions. This is hardly a novel conclusion in the theory of international law.[87] The disagreement between Nicaragua and Colombia did not concern the preclusive effect to be attributed the 2012 decision, but the scope of the decision itself, which remained equivocal. The ambiguity, however, does not appear to have been of the 'Delphic' kind, designed to avoid 'the indignity of an impugned judgment'.[88] Rather, as Judge Donoghue remarked in her dissent, it is ascribable to the Court's usual 'laconic' drafting style, where little discussion is generally offered of party positions before an equally brief conclusion is asserted.[89] The remark is particularly compelling because she had, in an opinion appended to the 2012 decision, lamented the Court's insufficient discussion of the inadequacy of Nicaragua's evidence.[90]

The *Delimitation of the Continental Shelf* makes clear that there is broad agreement as to both the applicability of the principle of *res judicata* in international dispute settlement and its requirements, confirming the principle affirmed in *Bosnian Genocide*:

> [i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.[91]

It may seem ironic that the Court chose to stress its reliance on the *Bosnian Genocide* judgment in both of the *Nicaragua v. Colombia* decisions. In the 2007 *Bosnian Genocide* case, as Wittich puts it, the Court's conclusion on the applicability of *res judicata* had only been possible because of a 'magical cut'.[92] The argument that the 1996 judgment necessarily (if implicitly) included a finding on the (preliminary) issue of whether FRY was a party to the Statute was something that neither the parties or the Court raised or discussed. The *Delimitation of the Continental Shelf* judgment runs in the opposite direction: Colombia's third preliminary objection was rejected on the basis that the first judgment contained no indications that the Court had ruled (on the merits) on Nicaragua's request. On this point, one does not see how the two judgments can be reconciled – indeed the Court found itself evenly split, and it bears

[86] Ibid., para. 45.
[87] See generally M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).
[88] W.M. Reisman, 'The Enforcement of International Judgments', (1969) 63 AJIL 1, at 4.
[89] *Delimitation of the Continental Shelf*, *supra* note 1, at 8, para. 36 (Judge Donoghue Dissenting Opinion).
[90] *Territorial and Maritime Dispute*, *supra* note 2, at 756, para. 17 (Judge Donoghue Dissenting Opinion).
[91] *Bosnian Genocide-Merits*, *supra* note 39, para. 126.
[92] Wittich, *supra* note 60, at 605.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

noting that the disagreement extended, almost to the same degree, to the judges who had taken part in the 2012 decision, six of whom voted in favour, four against.[93]

The approach the Court had taken in *Bosnian Genocide* meant that its reading of *res judicata* – admittedly broad and based on an implied finding – served the purpose of allowing it to put an end to protracted litigation. In *Delimitation of the Continental Shelf*, the Court did just the opposite by denying that it had pronounced on Nicaragua's request on the merits. The indications that the Court had in fact ruled on the matter were admittedly scarce. Yet, it can be argued that the situation was not much clearer in *Bosnian Genocide*. Even more problematic is the fact that, in *Delimitation of the Continental Shelf*, the Court justified the result at which it arrived with the introduction of what amounts to a 'procedural requirement'. One could argue that, had said procedural requirement been there, it should have rendered Nicaragua's claim inadmissible in the first case – and yet, somehow, it did not. It is true that in 2012 the Court noted that 'in deciding on the admissibility of the new claim, the Court is not addressing the issue of the validity of the legal grounds on which it is based'.[94] However, nothing would have prevented it from raising the objection *proprio motu* which, again, it did not do.[95]

5.2. Finality, coherence, and the limits of the judicial process

The majority's approach to the issue of *res judicata* can be read as a rejection of an excessive rigidity of the judicial process when justice so requires – in other words, a refutation of the idea that finality should entail infallibility.[96] This is because of the broad substantive consequences of *res judicata*, which mean that the decision binds the parties in or outside the courtroom.

In the case at issue, had *res judicata* intervened on Nicaragua's failure to prove that it had a continental shelf entitlement beyond 200 nautical miles, the problem would have been twofold. On the one hand, the 2012 judgment would have conclusively governed the relations between Nicaragua and Colombia. This would have been problematic in light of Nicaragua's aspiration to contest the illegality of the Colombian conduct on its alleged entitlement – incidentally, the subject of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.[97] On the other hand, the 2012 judgment would not have been opposable to third states, with Nicaragua free to establish, by going through the CLCS process, 'the outer limits of the continental margin vis-à-vis all parties to UNCLOS'.[98] In other words, a finding of *res judicata* would have run counter to the traditional considerations relating to the establishment of a border, where there is hardly any need to stress that certainty

[93] In favour: Judges Abraham, Owada, Yusuf, Greenwood, Bennouna, Tomka, Sebutinde, Skotnikov (*ad hoc* for Nicaragua in the latter case). Against: Judges Yusuf, Cançado Trinidade, Xue, Donoghue.

[94] *Territorial and Maritime Dispute*, *supra* note 2, at 665, para. 112.

[95] See Joint Dissenting Opinion, para. 46.

[96] See *Brown v. Allen*, 344 U.S. 443 (1953), at 540 (Jackson, J. concurring): 'We are not final because we are infallible, but we are infallible only because we are final'.

[97] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2017 (not yet published).

[98] Separate Opinion of Judge Greenwood, para. 6.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

and finality are important values, though at times the point was emphasized.[99] As it is frequently affirmed, a judgment concerning the territory or borders of a state may well be binding, *qua judgment*, only on the parties, but is, in practice, 'effective *erga omnes* for all other states'.[100] The argument can thus be made that concerns of consistency and coherence may have justified the approach adopted in the *Delimitation* case.

It is understandable that such complex circumstances may warrant a different approach. At the same time, however, one wonders if the bounds of the judicial process have not been overstepped. As Robert Jennings once argued, 'it is possible to exaggerate the importance of the judicial function in international law'.[101] Though this axiomatic proposition is a provocation, it bears recalling in this context that, while adjudication may preclude the use of alternative means of dispute settlement, this is not necessarily so after the judgment.[102] Such means were, in this case, open to the parties as far as the delimitation of an overlapping entitlement beyond 200 nautical miles from Nicaragua's coast was concerned. Indeed, Judge Donoghue noted in her opinion that a finding of *res judicata* would have concerned the determination of a failure to prove an entitlement, but could not be proof of the opposite fact.[103] Accordingly, the possibility of taking advantage of other means of dispute settlement to resolve the issue would have been open to the parties. Granted, such alternative means may, in a given case, be less convenient for the parties than judicial settlement. However, when available, they remain an option of which cognisance must be taken when an applicant has already had its day in Court.

It may also be observed that the odds of resolving a dispute through negotiation after a judgment too might be, in a way, dependent on the application of *res judicata*. It has been noted, with the broader question of compliance in mind, that ICJ decisions

99 *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, [1962] ICJ Rep. 6, at 34.

100 Rosenne, *supra* note 34, at 209; C. de Visscher, 'La chose jugée devant la cour internationale de La Haye' (1965) 1 *Revue Belge de Droit International* 5, at 9. See also Brown, *supra* note 41. The expression '*erga omnes*' has also been employed in this context to refer to the precedential force of the pronouncements of international adjudicators: L. Condorelli, 'L'autorité des décisions des juridictions internationales permanents', in *La jurisdiction internationale permanente, Colloque SFDI de Lyon 1987* (1987), 277. Note that the view that a judgment on a territorial question should have *erga omnes* effect has been disputed by Scobbie relying on the authority of *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Italian Intervention)*, [1984] ICJ Rep. 3, at 26–7. On that occasion, however, the Court approached the problem from the perspective of an adjudicator having to deal with prior decisions on the same issue and that of a state that could have potentially intervened, but did not. Suffice it to observe that the expression is used here in its broader scope, envisaged by De Visscher and acknowledged by Scobbie, that the opposability of the judgment to other states descends from its capability to establish an objective state of affairs. That no decision of international tribunals may 'cast international law in stone' is readily acknowledged: see S. Talmon, 'The South China Sea Arbitration and the Finality of "Final" Awards', (2017) 8 *Journal of International Dispute Settlement* 388, at 391.

101 R.Y. Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law', (1964) 13 ICLQ 385, at 394.

102 For an overview of the relationship between negotiation and judicial settlement see K. Wellens, *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis* (2016). See also J.G. Merrills, *International Dispute Settlement* (2011), 158. Moreover, the Court has always been mindful of the fact that 'The judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties"': see *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Judgment of 20 February 1969, [1969] ICJ Rep. 48, para. 87, citing with approval *Free Zones of Upper Savoy and the District of Gex* (*France v. Switzerland*), Order, PCIJ Series A No. 22.

103 *Delimitation of the Continental Shelf*, *supra* note 1, para. 45 (Judge Donoghue Dissenting Opinion) (emphasis added). Judge Greenwood appears to disagree with this proposition in his dissent (para. 6).

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

– and, to an extent, ICJ proceedings too – can serve as 'impetus for negotiated settlement'.[104] In this context, their ability to do so depends on their finality as much as it does on their binding nature. In other words, the possibility of reopening a case beyond the limits set by Articles 60 and 61 of the ICJ Statute is detrimental to the ability of the judgment to prompt the settlement of the dispute in one way or the other.

5.3. The value of finality and the protection of the judicial function

As the Court put it in *Bosnian Genocide*, its function, 'according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it"'.[105] What does this observation mean? It is submitted that the answer does not require a learned digression on the opposition between historical and legal truth, or on whether international litigation should be informed by an adversarial and transactional paradigm.[106] Rather, the answer may be found in the Statute, with its closed list of options for reopening a case, and the Court's consistent approach to the value of the finality of judgments.[107] In this context, it bears noting that the Court does not know a form of appeal: as it has been observed, 'the right of appeal per se represents the recognition that finality may be compromised by infallibility which may require correction'.[108] Such a compromise is only tolerable insofar as it structurally maintains the unity of the judicial process and does not, accordingly, undermine the authority of the adjudicator.[109] The revision process can only be partially subsumed under this framework, as it expressly absolves the Court from any flaw that may plague its judgment.[110]

The statutory basis of the principle of *res judicata* and its sound rationale should, thus, also inform its application in terms of scope. The pursuit of the end of litigation is inherent to the judicial function, not unlike – and, to a degree, for the same reasons as – the principle of *non liquet*.[111] In this regard, the views of the dissenting judges in *Delimitation of the Continental Shelf* are to be preferred: reading *res judicata* too narrowly undermines the judicial function, 'undercut[ting] the certainty, stability, and finality that judgments of th[e] Court should provide'.[112]

---

[104] A.P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18 EJIL 815, at 848.

[105] *Delimitation of the Continental Shelf*, *supra* note 1, para. 66 (Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower Joint Dissenting Opinion).

[106] M.R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1991), 145. See also *Delimitation of the Continental Shelf*, *supra* note 1, para. 30 (Judge Owada Separate Opinion).

[107] *Request for Interpretation - Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 36, at 31, 36 (para. 12).

[108] N. Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19 EJIL 43, at 51.

[109] E. Harnon, 'Res Judicata and Identity of Actions Law and Rationale', (1966) 1 *Israel Law Review* 539, at 539; Cited in Gal-Or, *supra* note 108, at 51.

[110] Art. 61 provides that an application for revision of a judgment may only be based upon the discovery of a decisive fact, unknown to the Court and to the party claiming revision at the time of the judgment, and on condition that its ignorance was not due to the party's negligence.

[111] P. Weil, 'The Court Cannot Conclude Definitively ... Non Liquet Revisited Chapter 1: Questions of Theory', (1998) 36 *Columbia Journal of Transnational Law* 109, at 114.

[112] *Delimitation of the Continental Shelf*, *supra* note 1, para. 67 (Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower Joint Dissenting Opinion).

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

This is not to say that the practical application of the principle is devoid of complications. In this regard, one point raised in the decision and supported by the partly dissenting Judge Donoghue (the Joint Dissent does not address the issue) serves as a paradigmatic example: in the 2012 judgment the Court had said nothing about:

> the maritime areas located to the east of the line lying 200 nautical miles from the islands fringing the Nicaraguan coast, beyond which the Court did not continue its delimitation exercise, and to the west of the line lying 200 nautical miles from Colombia's mainland.[113]

The Court, however, says that it 'was, as regards these areas, faced with competing claims by the Parties concerning the continental shelf'.[114] Indeed, Nicaragua had requested that the islands of San Andrés and Providencia and Santa Catalina 'be enclaved and accorded a maritime entitlement of 12 nautical miles'.[115] That the Court did not rule on the matter of delimitation of the continental shelf in the area is apparent, but Nicaragua did not request such ruling either. Should the Court have considered this claim as barred?

The answer largely depends on one's understanding of the scope of *res judicata*, which in turn, hinges upon the accepted rationale for the principle. It is respectfully submitted that, in a potentially never-ending dispute such as this one, a broad doctrine of the claim of estoppel (precluding claims that, had reasonable diligence been exercised, might have been brought at the time) should be taken into serious consideration. One such doctrine would also discourage tactical claim splitting and foster efficiency in international adjudication. Yet, even adopting one such model (which, in any event, has not yet received any express acceptance) this approach would not be devoid of difficulties.[116] In that regard, the dissenting judges' espousal of the doctrine of 'exhaustion of treaty processes' does not necessarily come across as an easier solution, as it is subject to the same pitfalls: determining whether a 'particular matters of complaint' has truly been prosecuted to judgment.[117]

6. Conclusion

'The Court of Justice', Salmond observed, 'may make mistakes but no one will be heard to say so. For their function is to terminate disputes and their decisions must be accepted as final beyond question'.[118] With this in mind, the application of the *res*

---

113 *Delimitation of the Continental Shelf*, *supra* note 1, para. 83.

114 Ibid.

115 *Territorial and Maritime Dispute*, *supra* note 2, at 671, para. 134.

116 Wittich observes, for example, that issue estoppel could be a possible reading of *Bosnian Genocide-Merits*, *supra* note 39. However, even extending the doctrine to determinations taken by the Court *motu proprio*, its breadth would still be, in all likeliness, excessive: see *supra* note 60, at 607. Nor did cases like *Apotex* (*supra* note 28) produce such a broad preclusive effect.

117 *Delimitation of the Continental Shelf*, *supra* note 1, paras. 59–62 (Judges Yusuf, Cançado Trinidade, Xue, Gaja, Bhandari, Robinson, and Brower Joint Dissenting Opinion). The expression was employed in *Barcelona Traction*, Preliminary Objections, Judgment of 24 July 1964, [1964] ICJ Rep. 6, at 20, 26.

118 J. Salmond, *Jurisprudence* (1947), 484. It is telling that in *Bosnian Genocide-Merits*, *supra* note 39, the Court recited the brocard *res judicata pro veritate habetur* in its entirety. See also Gal-Or, *supra* note 108, at 51.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press

judicata principle by the ICJ in the *Delimitation of the Continental Shelf* judgment may appear concerning. The choice to construe *res judicata* narrowly may be seen as a precedent with regards to an applicant's ability to reopen a case beyond the bounds of what the Statute permits. As the dissenting judges noted, this undermines the authority of the Court, and the judicial function writ large.

The application of *res judicata* should be informed by the purposes of the principle: finality of litigation and protection from repeat litigation. The Court did not do so in *Delimitation of the Continental Shelf*. Instead, it allowed a long-running dispute to continue and seemingly emerged as an enabler of litigious states without a solid justification. Moreover, the Court's narrow reading of the principle emerges as an implicit endorsement of a party's claim-splitting strategies. From the perspective of the sound administration of justice, such a position is inefficient for both the Court (which could see an increased case load) and a respondent state (which may be exposed to vexatious claims and face higher transaction costs).

A cavalier attitude to the issue of finality may also have wide-ranging implications. Beyond the capacity of its jurisprudence to influence the approach of other tribunals, the Court has an 'institutional responsibility' as an organ that is routinely granted supervisory functions in relation with arbitral proceedings and awards.[119] The Court's traditional judiciousness in resolving these disputes has been recognized,[120] but, if it does not stand by the finality of its own judgments, it may appear inadequately placed for this and other tasks.

119 W.M. Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', (1996) 258 RCADI 9, at 221. The point has been raised that this role is assigned to the ICJ by default in the ICSID Convention (Article 64): see C.N. Brower, M. Ottolenghi and P. Prows, 'The Saga of CMS: Res Judicata, Precedent and the Legitimacy of ICSID Arbitration', in C. Binder et al. (eds.), *International Investment Law for the 21st Century* (2009), 848.

120 Ibid.

https://doi.org/10.1017/S092215651800002X Published online by Cambridge University Press